Lessons learned on the eighth floor

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11/28/2011

I have been asked to document lessons I have learned about the workers' compensation practice since I began in 1975, but especially those lessons I have learned since becoming an arbitrator in 2004. Nothing contained herein will solve all the issues for everyone because we are all individual personalities. However, if what you are trying to accomplish is not working you may want to consider some of the following techniques that have worked for me.

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On my first day as an attorney I learned that I was going to be practicing Workers' Compensation Law. I was handed a copy of the Workers' Compensation Act and instructed to study it. A few days later I learned the assigned arbitrator for Waukegan, Robert Haubrich, was in town. I made it a point to go over to the courthouse and introduce myself.

I asked him if he had any advice for me as I begin my new career. He thought for a moment, smiled, and said: "No one has ever asked me that question but it will be very helpful to you if you would watch the good lawyers". "Who are they?" I asked. He provided me with a list of respondent and petitioner lawyers he admired.

Whenever the opportunity presented itself over the next few months I would hang out in the hearing room bleachers and listen to the advocates. The attorneys noticed my interest in them, were kind enough to answer any questions I had and share with me their strategies and techniques. They became my friends, mentors, opponents and competitors. Everything I learned about the business, good or bad, I learned from them.

In the process I discovered that I was developing a passion for advocating on behalf of someone who could not speak for themselves. And, I learned that this passion for advocating on behalf of clients existed between all the talented respondent and petitioner lawyers. In those days they respected each other even though they were on different sides of the issue.

Other than the respect with which they showed each other there were two things I observed that set these talented lawyers apart from their contemporaries. First, they had an excellent command of the facts of their cases. Second, they had a wonderful ability to frame a question in a fashion that would paint a word picture of what they wanted the listener to see in his mind. In short they were prepared.

My interest in advocating on behalf of others did not necessarily come easily. It was a learning process. I found that the Boy Scout Motto "Be prepared" was the best advice I could follow when it came trying a case.

I suspect each of us has received help from others as we made our way through our careers and life. I feel this same responsibility to offer advice to

the young lawyers who have asked me for help and are looking to improve their skills.

Notice and Motions

Notice and due process

Motions, Notice of Motions, Orders are filed on IC04 forms with proof of service to comply with due process requirements. Form IC04 will usually take care of most situations that you will encounter. However, I urge you to make certain that the notice requirements are completed on the form including the date for the actual presentation of the motion. You will usually just get a notice of motion for the "status call" date, not the "trial call" date, without a written record to the responding party of notice for the "trial call" date and in such case there is no good record of proof of service for the date the motion is being presented.

I do not grant the motions that lack notice requirements for the simple reason that my action is not supported by the record. This is a situation where if you had granted the motion you might receive a phone call from a state representative or state senator months after your action complaining of a violation of his constituent's due process notice rights. When you pull the Commission file from the vault to check on the allegation, what actually happened and respond to it you will find you have no due process record in the Commission file supporting your action.

Motions

Similarly, I refuse to grant oral motions or written motions that do not explain the relief the moving party is seeking or the basis for the relief he is seeking.

Motions to withdraw, (irreconcilable differences)

Attorneys frequently will present a motion to withdraw based upon what they might describe as "irreconcilable differences." When you hear that kind of allegation you might want to make further inquiry. If you learn the problem is that the client and the attorney disagree on the value of the case it is my view that under most circumstances the attorney has an obligation to try the case. It is my view that the case belongs to the client and the client has a constitutional right of freedom to make the wrong decision as to the value of his case. The attorney does not have the right to block or

sabotage his client's decision making process or abandon the client just because he disagrees with the client's decision. However, if the attorney feels strongly about the correctness of his advice he should cover himself with a letter to the client explaining in detail how he came to an opposite conclusion and then try the case.

The other issue that arises in this situation is that if you allow the attorney to withdraw you may end up trying the case on an *ex parte* basis for the attorney who will ultimately try to recover a full fee.

Motions to withdraw, (lost clients)

You will also be faced with motions to withdraw by attorneys who wish to withdraw because they have not had any contact with their client in two, three years or more, (see form IC28). It may be a mistake for an attorney to assume that he can avoid a charge of client abandonment where he has lost contact with his client and then he obtained prior approval from an arbitrator to withdraw, (see Rule 1.16 (c)). In such cases I will first allow the attorney time to get his file documented with the efforts he has made to locate the client. Once he has had the opportunity to document his file and he presents the motion to withdraw at a later date; I will deny the motion in most cases, note the presence of the attorney for the record, and then dismiss the case for want of prosecution, (see Rule 1.16 (d)).

The other problem with allowing a withdrawal under these circumstances is the case remains dormant on the arbitrator's call while the attorney who should be handling this case has escaped. In such a case the withdrawing attorney has succeeded in turning a portion of your call into a garbage can.

Motions to dismiss claim

I frequently get oral motions from respondents to dismiss a claim. I generally deny these motions. I feel that it is not too much to ask an attorney to prepare a written motion setting forth the relief he is seeking and why he is seeking a dismissal so there is a record of what happened. If I am terminating someone's rights I want to have a record of what I did and why I did what I did. This also serves to protect the Commission.

Motions to substitute attorneys, dismiss attorneys, or voluntary dismissals

Petitioner's voluntary motions to dismiss their claims do not present any problem if accompanied by a completed and signed forms IC17 and IC04.

A party has a right to dismiss an attorney at any time and that can be accomplished with properly completed and filed forms IC27 and IC04.

You will also see a number of motions to substitute attorneys on form IC29. However, it has been my experience that the responding attorney rarely shows up to sign the substitution possibly because of a belief that he will be compromising a later claim for attorney fees.

Pretrial conferences

You will be frequently asked to lend your advice and expertise by conducting a pretrial conference. I am happy to accommodate the parties if both join in the request but you should be aware that you should not and cannot force a party into a pretrial conference if the party refuses to participate because a party has a constitutional right to a trial if it so desires.

Most pretrial conferences are fact dependent, *e.g.,* on the value of the case. I am happy to help out in such instances because it frequently results in the resolution of the case. However, I refuse to use a pretrial conference as an opportunity for the attorneys to get me to do legal research that should be done by the attorneys for the parties.

TRIALS, EXHIBITS, ADMISSION OF EVIDENCE

The trial call

The monthly trial call does serve a good purpose even though at times you may think that we are just providing a "dating service" for the attorneys. It serves the attorneys as a reminder to review the case, bring each other up to date on petitioner's medical treatment, and what else needs to be done in order to bring the claim to a conclusion.

* * * * *

You may be surprised to learn the number of attorneys who appear before you to try a case and do not know how to ask a question by examining their own client or witness. Sadly, some of the practitioners do not have an understanding of the work that their client or their client's employee does thereby making it impossible for them to ask a question in a way that will create a picture of the petitioner's work in the mind of the listener.

In my first few years as an arbitrator I thought that the attorneys who were unprepared didn't care about the problems they were creating for the arbitrator. However, I now believe the problem is due to a lack of training. If I am correct, the more you can help an attorney improve on his skills the easier your job will become in the long run.

If an attorney is looking for advice from me I recommend that he or she familiarize themselves with the facts of his case and that they write down their questions for the witness in advance. Therefore, they can avoid unnecessary objections to their questions and gain confidence from the fact that they are not being interrupted by objections from their opponent. Additionally, written questions should result in a chronological outline of the case and give the attorney confidence that he or she has not forgotten anything necessary to prove each element of their case.

I have always been amazed that the best and most successful lawyers have an outline of the case which they follow and yet the newly minted attorneys believe they can successfully try a case by the "seat of their pants method."

The stipulation sheet (request for hearing form)

The stipulation sheet frames the issues in the case and is the outline for the trial. The attorneys must provide you with a completed stip sheet prior to trial. The attorneys will hand you a stip sheet and advise you they are ready. I strongly advise that you read and study the stip sheet carefully because it is rarely filled out completely or accurately. If you don't discover this until you are writing your decision you will have additional issues to decide but without any idea of the positions of the attorneys on those issues.

Another common issue arises as to the amount of TTD claimed or paid on the stip sheet. The IWCC form lists TTD claimed or paid "from" a date certain "through" a date certain. However, on some occasions the attorneys will list the amount of TTD claimed as "from" a date certain "to" a date certain. And, sometimes the attorneys will simply separate the dates with a dash (-), thereby adding to the confusion. Therefore, you may have to train the attorneys that "through" means "to the end of," "to" means "to the beginning of," and a dash is unacceptably ambiguous and therefore unacceptable.

Prioritization

Recognize that it is up to you to control your hearing room and prioritize your work. You are a public servant, you are in charge of your hearing room, and it is up to you to decide your priorities. You might be faced with numerous trials in one day. You may decide that a short trial where the parties are ready to go is your first priority or that cases involving unpaid TTD, witnesses from out of state, or prospective medical care issues should go first and that nature and extent issues should go last. You should train the attorneys who appear before you that if they are planning in bringing in witnesses from out of state or if they anticipate a trial that will last a full day that the attorneys consult with you on scheduling issues.

* * * * *

You may be faced with a record that is so incomplete and ambiguous that you are unable to come to a fair conclusion on the issues. In such a case the Illinois Workers' Compensation Act has provided you with a powerful remedy. However, there is no unanimity among the various arbitrators as to whether or not it is appropriate to exercise this power. Therefore, you are

going to have to decide for yourself when and whether or not you are going to exercise this power.

W/C Act: Powers of arbitrators(820 ILCS 305/19), Sec. 19b. Any disputed questions of law or fact shall be determined as herein provided. The Arbitrator shall make such inquiries and investigations as he or they shall deem necessary and may examine and inspect all books, papers, records, places, or premises relating to the questions in dispute and hear such proper evidence as the parties may submit.

Some arbitrators do not desire to exercise the powers granted by Section 19b because they have concluded that by exercising these powers they might be demonstrating impartiality by becoming an advocate for one party or the other. My view is that Section 19b is simply another tool provided to the arbitrator by the legislature and this tool has significant value in aiding the fact-finding process. There are numerous ways to ask a "who, what, where, when," question without advocating for one side or the other. Nevertheless, you are going to have to decide if, when, and how you will handle this issue as you go about your duties.

You might listen to conflicting testimony for hours on end after which it becomes abundantly clear to you that one of the witnesses has been less than candid in his testimony. You may be surprised how quickly a contested case will settle once the arbitrator enters an order requiring the production and inspection of certain relevant books, papers and records.

There are also situations that arise where it is my practice to instruct the witness not to answer the question or questions put to him or her by the attorneys. Examples are questions that obviously are ambiguous or the attorney has asked multiple questions without giving the witness an opportunity to answer so when he finally gets a chance to speak I am unsure which one of the questions the witness is answering or attempting to answer.

Beware of bankers' boxes, (You are not the attorney's, secretary, clerk or paralegal)

My arbitration assignment was in Chicago where the arbitrators were scheduled 10 trial days per month. I could count on anywhere from 30 to 90 cases on any given trial call. Generally, the attorneys would start lining

up outside my hearing room around 8:45 AM to request a continuance, report a settlement, present a motion, request a pretrial conference, or announce they are ready for trial. It might take until 10:00 or 10:30 AM before all the preliminary work is done and you can set the order of your trials for the day. This requires a certain amount of prioritization on your part hopefully allowing you to get as much work done as possible in the shortest period of time.

Inevitably an attorney will show up during this process with one or two bankers' boxes in tow on a two wheel cart and start to set up shop on one of the attorney desks in your hearing room. The attorney is making the erroneous assumption that he is next in line for trial. Unless you act immediately you will risk losing control of your hearing room and your priorities.

One can generally make the following valid assumptions about large files contained in bankers' boxes. The exhibits are disorganized, cumulative, irrelevant, needlessly duplicative, and do not follow any semblance of chronological order. Many of the exhibits contain hundreds of pages each yet they are not even paginated. In order to confirm my suspicions I take the first opportunity to motion the attorney to approach and ask the lawyer to show me his exhibits. After reviewing the exhibits and confirming my suspicions I explain why he is not ready for trial, suggest he go find his opponent, spend a few hours getting the exhibits in proper chronological order, eliminate irrelevant material, and paginate the remaining documents.

Until recently, attorneys would argue to the arbitrator that they were entitled to have the certified documents submitted in evidence in the form that they receive them from the providers of medical care without any due consideration for their organization or relevance based upon the following language contained in Section 16, as follows:

(820 ILCS 305/16) Sec. 16. Rules, Subpoena, Medical records admissible

The records, reports, and bills kept by a treating hospital, treating physician, or other treating healthcare provider that renders treatment to the employee as a result of the accident in question, certified as true and correct by the hospital, physician, or other healthcare provider or by designated agents of the hospital,

physician, or other healthcare provider, showing the medical and surgical treatment given an injured employee by such hospital, physician, or other healthcare provider, shall be admissible without any further proof as evidence of the medical and surgical matters stated therein, but shall not be conclusive proof of such matters. There shall be a rebuttable presumption that any such records, reports, and bills received in response to Commission subpoena are certified to be true and correct.

Unfortunately, Section 16 worked fine for the attorneys but not for the arbitrators. An arbitrator with a Chicago call will have approximately 3000 cases to manage, conduct at least 100 trials, and author a similar number of decisions per year; all without any staff help. Compare that with the trial work load of the average workers' compensation practitioner.

Fortunately you are beginning your arbitration careers in a more enlightened age.

See: **Illinois Evidence Code** *eff. 1/1/2011*

Article IV. relevancy and its limits

Rule 401

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402

All relevant evidence is admissible, except as otherwise provided by law. Evidence which is not relevant is not admissible.

Rule 403

Although relevant, evidence may be excluded if its probative value is substantially overweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, *or by considerations of undue delay, of time, or needless presentation of cumulative evidence.*

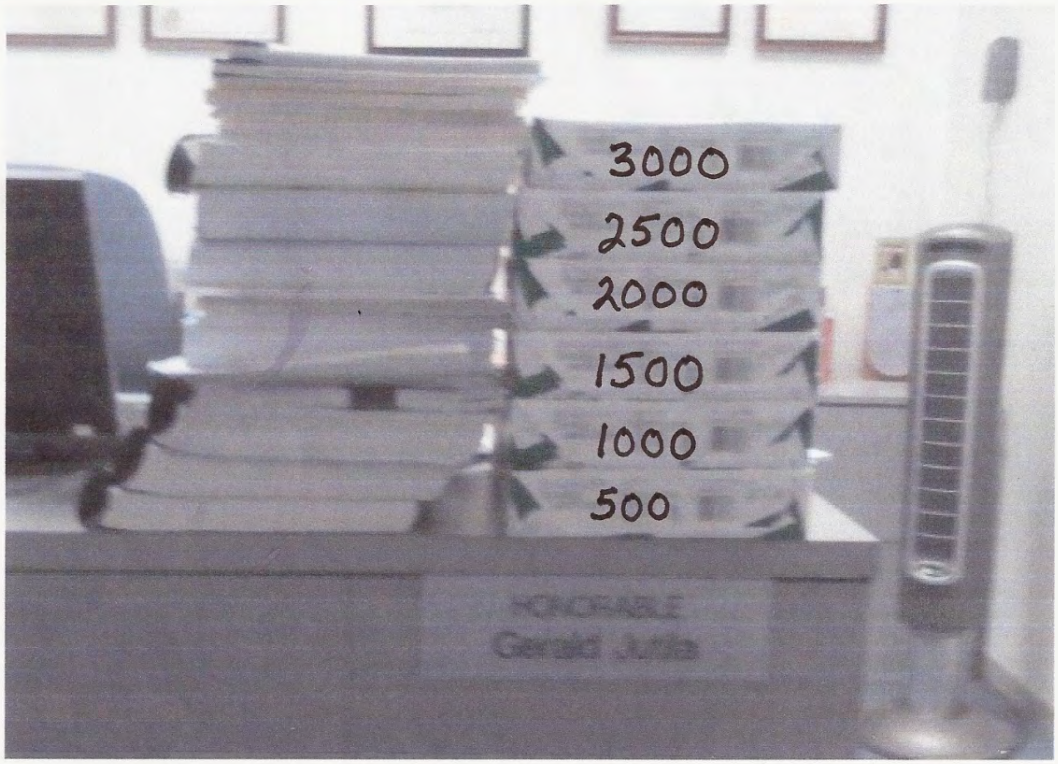
The Illinois Evidence Code is another tool designed to make your job easier and your work product more efficient. It would be a serious mistake on your part not to know and take advantage of the provisions of this code. You would be amazed at the number of attorneys that have no idea of the existence of the recently enacted Illinois Evidence Code.

I have no doubt that the appellate court will support you in your efforts to eliminate irrelevant evidence based upon the numerous comments they have made over the last few years wherein the court has gone to great efforts to remind the practicing bar that the court is not to be used as a dumping ground for needless cumulative and irrelevant evidence. (See fig. 1).

Duplicate exhibits

You will also frequently encounter a situation where a respondent attorney will offer in evidence an exhibit that appears to be a duplicate of one of the petitioner's exhibits. When you inquire you may learn that the two exhibits are substantially the same but the attorney offering the second exhibit is not quite sure that the exhibits are identical because his exhibit appears a little thicker than that offered by his opponent and he hasn't actually compared the two exhibits. Therefore, in order to cover himself he wants to offer the duplicate exhibit.

You have probably encountered the "Hocus-Focus" comic strip (*see fig 2)* that contains two deceptively similar drawings where you are challenged to find at least six differences between the two panels. Imagine the time required for an arbitrator to examine an exhibit of a few hundred pages (not just two panels) in order to attempt to discover differences between two similar exhibits. Therefore, it is my opinion that it is the duty of the attorney offering the exhibit to discover those differences before offering duplicate exhibits. If the arbitrator allows the duplicate exhibit without requiring this extra work by the attorneys he has, in my opinion, totally relinquished control of his hearing room.



(See fig 1. The stack of paper on the left contains trial exhibits. The stack of paper on the right is for comparative purposes and contains six 500 page reams of paper, over 3000 pages.)

Fig 2, Hocus-Focus, © Henry Boltinoff and King Features Syndicate 2011, Arizona Republic

Exhibit lists

The attorneys will commonly offer their exhibits in a random order similar to a deck of cards that has recently been shuffled. You might ask why they do this but will not get a satisfactory answer because the attorneys who do this do not have an answer to the question; otherwise they would do things differently.

The human brain is capable of a limited ability to collate data. However, most arbitrators would agree that since the advent of the information age the brain best understands large amounts of data when presented in chronological order. You might recall the questions of Senator Howard Baker during the Watergate Hearings when he famously asked: "What did you know and when did you know it?"

The role of an advocate is to organize a simple chronological statement of relevant facts in order to lead the reader to be persuaded to reach a logical conclusion that favors the attorney's client. Anything else is surplus and diminishes the effectiveness of the argument. Anything out of order confuses and weakens the argument.

Therefore, I will not accept randomized exhibits. I insist on exhibit lists listing the exhibits in chronological order by the name of the provider of medical care and the dates of care. Some lawyers will complain this is an impossible task because some of the exhibits overlap each other. In that case I explain that it is permissible to break up the individual exhibits into multiple exhibits to maintain a chronological continuity.

Settlement contracts

Cases are randomly assigned to arbitrators when they are filed at the Commission. It is important to maintain the integrity of this assignment system by making sure you do not assume jurisdiction of another arbitrator's case unless it has been reassigned to you. This issue usually comes up during a busy trial call when an attorney steps up and asks that you approve a contract. The problem is that this request may cause you to rush through the review and approval process before determining whether or not the case is actually assigned to you by checking the mainframe computer or the arbitrator's Arbtrack. On a number of occasions you might find that the contract you are being asked to approve has been returned by another arbitrator for various reasons and the attorney involved is simply (sometimes intentionally) trying to get around the return of contract by having you put your stamp of approval on the contract when you are too busy to catch on to what is happening. Therefore, I do not make it a practice to approve settlement contracts during the morning trial call. However, I will accept the contracts from the attorneys and ask them to come back at a later time after I have had an opportunity to review the contract.

Fig 3. Most arbitrators use similar forms to return contracts if they have questions about settlement contracts or desire that the attorneys make changes to the contracts before approving the contracts. Do not confuse this form with the Rejection of Settlement Contract form, IC32.

Return of settlement contracts

Re:_____WC_____

Counsel:

I am returning these settlement contracts to you for the following reason(s):

_____The contract or contract rider has not been properly signed.

_____The parties have not dated their signatures.

_____The changes to the contracts have not been initialed and dated.

_____The changes to the contracts are not legible.

_____The waiver of rights is overly broad.

_____All required information has not been provided.

_____The contracts contain computational errors.

_____The requested fee exceeds the limits of Section 16(a). You may reduce the fee to the amount allowed by Section 16(a) or submit a petition setting forth a reasonable basis for claiming a fee in excess of the statutory limits and motion it for a hearing on the Fee Petition. Be prepared to have your client testify at the hearing.

_____A recent relevant medical report or record has not been provided.

_____Provide an itemization of the case expenses you are claiming.

_____Other:_____

Please make the requested changes or provide the requested information and resubmit the contracts to me with this form.

_____, arbitrator _____date

The arbitrator has an obligation to carefully review the contracts before putting his stamp of approval on them. There are recurring issues that arise on settlement contracts that tend to create ambiguities and future potential problems for the Commission in the form in which they are submitted.

For example: I do not approve contracts that are not dated and neither should you. A used car loan requires more dates and signatures than a lump sum settlement and yet those forms are filled out by car salesmen; not attorneys. Some of the contracts you will be asked to review and approve exceed $500k, considerably more than the value of a used car. I do not approve contracts where the contracts purport to waive or extinguish rights granted by other statutes over which I do not have any approval authority. And, I do not approve any contracts that are ambiguous by their very terms or contain broad waivers extinguishing rights beyond the date the petitioner signed the contracts, especially when the contracts show the petitioner is still working for the respondent. I do not approve contracts that do not have a reasonable facsimile of a recognizable signature. It is arrogant for someone to substitute their signature with a straight line or check mark in lieu of a signature when such a mark would be unacceptable on a driver's license issued by Jesse White or a check written on the attorney's bank account. Finally, consider that much of the mortgage crisis was due to submission of incomplete documentation that failed to contain complete signatures and dates, and yet were approved by attorneys.

Recognize and question apparent excessive costs

You may be surprised that some attorneys add fictitious costs that they deduct from their client's gross settlement in order to increase the amount payable to the attorney. These attempts are quite amateurish and fairly obvious. You don't want to be part of this type of fraudulent scheme. Therefore, if you suspect something I recommend you use your Sec. 19(b) powers and demand documentation of the actual costs paid.

Avoid approving contracts assignable or subject to lien, attachment, or garnishment, (820 ILCS 305, Sec. 21)

There are a number of high interest loan companies operating in Illinois that target injured workers and their future settlements by providing loans to petitioner's with loans against the future settlements. Sometimes the settlement contracts contain language that purports to hold that payments

under the award shall be assignable or subject to a lien, debt, penalty or damages. I do not approve contracts with that language because they violate the provisions of Sec. 21.

Problems created by duplicate filed claims and separately filed contracts

Duplicate filed Applications for Adjustment of Claims present numerous problems for the Commission and the administration of the Act. These duplicate filings usually have their origins in one attorney seeking an advantage over his predecessor attorney. They are sometimes based on fraudulent statements and certainly create extra work for the Commission. (See the arbitrator's decision in *Maln v. Paul TV* for an analysis on dealing with this issue.)

Rejected settlement contracts

There are cases in which the attorneys refuse to make the requested changes to the settlement contracts. Those cases usually involve a request for attorney fees in excess of that allowed by Section 16a.

Limitation on attorney fees, (820 ILCS 305/16a), Sec. 16a. Section 16a contains a number of provisions. But for the purpose of this discussion the arbitrator should be aware that this section limits fees allowed to the attorney unless there is a hearing by the Commission fixing attorney fees. I interpret this section to mean there is an actual hearing and record made with testimony from both the petitioner and his attorney.

There are cases where attorneys bring in affidavits signed by their clients approving fees in excess of the limitations of Section 16a. I rarely approve such a fee solely supported by a client's affidavit unless the record is abundantly clear that a fee in excess of that allowed by Section 16a is justified. I have no problem awarding additional fees if justified; and I believe what is justified after three decades in the practice. The problem is that since becoming an arbitrator I have seen some serious attempts of gross overreaching by attorneys on fees. Therefore, I believe it is important to scrutinize any contracts with fees in excess of the 364 week limitation. Don't be surprised if you are even subjected to outright hostilities if you limit an attorney's fee, (see *Maln* decision). If I thought it necessary, I would make a record in case questions arose in the future. Otherwise I might take

the risk that a disinterested or disgruntled party might raise the question of a possible *quid pro quo* at a later date.

Reporting rejected settlement contracts

If you decide to reject the contract you must fill out IWCC form 32 with a statement of the factual background for the rejection and your reasons for your rejection of the contract. The rejection will then be reviewed by one of the Commissioners on a randomly assigned basis.

We are public servants so be helpful

I previously have mentioned the need for keeping control of your hearing room. Nevertheless, you must also be mindful that we are public servants and therefore we have a duty to be helpful to the attorneys and the litigants who appear before us. You will be amazed what you can accomplish by simply asking the attorneys: "How can I help you?" That question gently nudges the door open without either party having to proceed from a position of weakness.

At the end of the day you are going to derive a great deal of satisfaction when you can leave the office and go home knowing that you have solved a problem or problems that were seemingly insurmountable to the parties at the beginning of the day.

You will be required to constantly perform a balancing act; being courteous to the attorneys and the litigants while at the same time demanding respect and maintaining control of your room. You have a number of tools at your disposal to accomplish this goal. Use them all. And, "yes, humor does work."

Demand candor. Be candid

The duty of an attorney to maintain client confidences is universally known and respected by both attorneys and their clients. However, that rule is not without exception.

Rules of professional conduct *eff. 1/1/2010*

Rule 3.3 Candor toward the tribunal. A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures including if necessary , disclosure to the tribunal.

A lawyer shall not fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

In the case of false testimony by the client grave consequences could result to the client including loss of the case and perhaps prosecution for perjury. But for this rule change the lawyer could end up cooperating in deceiving the court, thereby subverting the truth finding process which the adversary system is designed to implement. Without this rule change the danger is that the client could in effect coerce the lawyer to being a party to a fraud on the court.

This is a recent rule change. Therefore, it is important that attorneys and their clients be made aware of the rule change and they avoid the consequences of the rule.

We arbitrators demand candor from the attorneys and their clients. We also owe the attorneys and their clients the duty of candor and respect in our dealings with them.

* * * * *

If I find myself in the rare situation where I might not be able to reach a case for trial and the litigants have been patiently waiting around for most of the day I bring them in, explain the situation to them what has happened, how it happened, apologize for the inconvenience, and try to find a way to

make amends. That gets the attorneys off the hook and it is good public relations for our state agency.

Code of judicial conduct

I recommend you keep a copy of the Code of Judicial Conduct handy for whenever issues arise to remind you of your responsibilities. The Code consists of 15 brief pages. It is a simple code and can keep you out of trouble. You should review it from time to time.

Audi Alteram Partem *(Listen to the other side)*

It is an essential part of the arbitrator's duties that he abides by the maxim that he listen to the other side. Otherwise, the result would be a complete lack of public confidence and trust in the work we do. Before signing off on an adverse decision I review the factual and legal basis for same. We are all going to make errors from time to time but if we listen to the other side those errors will be few. If you don't agree with the conclusions of one side or the other you should address the reason or reasons why you don't accept their arguments.

Decision templates for desk top

Decision template forms are available on the forms links of the IWCC web page. These forms can be downloaded to your desktop and modified for your use by using the unprotect password "iwcc". However, also please modify them to be grammatically correct. If you do a sloppy job on your written decision the attorneys might conclude that the same lack of quality work is acceptable from them. That doesn't do anything for improving the quality of our practice and the respect we desire from our fellow attorneys and judges.

I also have created a decision template for Finding of Facts and Issues and Conclusions for my desktop for convenience and speed in writing my decisions. In using the template simply delete the issues that do not apply from the template.

(See fig 4)

BACKGROUND

SUMMARY OF THE CASE

FINDING OF FACTS

ISSUES AND CONCLUSIONS

Was respondent operating under and subject to the Illinois Workers' Compensation Act or Occupational Diseases Act?

Was there and employee-employer relationship?

Did an accident occur that arose out of and in the course of petitioner's employment by the respondent?

What was the date of accident?

Was timely notice of the accident given to respondent?

Is the petitioner's present condition of ill-being causally related to the injury?

What were petitioner's earnings?

Were the medical services that were provided to petitioner reasonable and necessary?

Should the respondent be required to authorize and provide for prospective medical care?

What temporary benefits are in dispute?

What is the nature and extent of the injury?

Should penalties or fees be imposed upon respondent?

Is respondent due any credit?

(Fig 4)

Try to avoid passive language in your decision, conclusion and analysis. You are making a strong positive statement for each issue in dispute. Therefore, once I make my decision I like to start out with the following language:

"The arbitrator concludes that the petitioner has proven by a preponderance of the evidence that he was injured in an accident that arose out of his employment for the following reasons: . . . . or; . . . . failed to prove he was injured in an accident that arose out of his employment for the following reasons: . . . ."

Your conclusion should be followed by a list of persuasive evidence in support of your conclusion. If you don't set forth your reasoning you will have a hard time convincing anyone that you made the right decision.

On the other hand you may be amazed at the power you can exercise in a well-reasoned decision. (See for example this arbitrator's decision in *Mocchi vs. Chicago Tribune* (Appendix 1), wherein the respondent denied petitioner was injured in an accident that arose out of his employment.

Prior to the arbitrator issuing this decision the Tribune's Editorial Board had published a series of editorials criticizing the Commission and Courts on some of our decisions on the issue of "arising out of employment . . . ." I agree that some of that editorial criticism may have been well-founded. However, in some cases the editors did not know what they were talking about. Therefore I admit to some satisfaction in receiving a message from an attorney for "*The World's Greatest Newspaper*" that after reading my decision his client decided not to file for a review but would pay for the petitioner's surgery.

In addition you should not be afraid to challenge previously accepted notions of applicable law if there is good reason to do so, (see for example this arbitrator's decision in *Maln v Paul's TV* (Appendix 2).

Statistics

The Commission has recently made significant improvements in the timeliness and accuracy of arbitrator statistics. The Commission statistics deal for the most part with decisions that are affirmed and adopted, reversals, and modifications; up or down. Some arbitrators create their own Excel worksheets that contain more data than that provided by the Commission and may be helpful to you in dealing with careless charges of bias.

Unfortunately there are some irresponsible attorneys who are too quick to level a charge of bias when they receive a decision with which they disagree. We arbitrators are required to suffer in silence when those charges are leveled against us, even if unfairly. However, I have found that my statistics have been very helpful to me in the event anyone other than a party or an attorney for a party questions my decisions.

At any rate if you decide to create your own worksheet I recommend you do so as soon as you start writing decisions so that you are able to maintain a complete record of your work and you do not have to go through a time consuming reconstruction of what you have done in the past.

Be aware of what is going on around you

There is considerable anxiety associated with petitioner's visiting the IWCC simply because of the uncertainty that they experience. You will note that petitioners will gather in the waiting room outside your hearing room where they can see you and hopefully get a clue as to what is going to be happening to them on the trial date. Therefore it is important that you not get cozy with the lawyers or too casual with the lawyers so that the petitioner or witnesses might inadvertently come to an erroneous conclusion to your feelings about the merits of the claim, defense, or the possibility of any favoritism toward the lawyers.

I also believe it is important that attorneys who are trying cases before you are dressed appropriately and respectfully.

STATE OF ILLINOIS)
)SS.
COUNTY OF **COOK**)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Alan Mocchi
Employee/Petitioner

v.

Chicago Tribune
Employer/Respondent

Case # **10WC04781**

Chicago, arbitrator Jutila

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Jutila**, Arbitrator of the Commission, in the city of **Chicago**, on **July 12 and August 4, 2010**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☐ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **January 2, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$57,271.76**; the average weekly wage was **$1,101.38**.

On the date of accident, Petitioner was **43** years of age, ***married*** with **3** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$20,244.32** for TTD previously paid to petitioner.

ORDER

Medical benefits

Respondent shall pay reasonable and necessary medical services contained in PX1 group exhibit (Dr. Mannion, Rush Oak Park Emergency Physicians, River Forest Fire Department, and Dr. Grindstaff), as provided in Sections 8(a) and 8.2 of the Act.

Prospective medical benefits

Respondent shall authorize and provide for prospective medical surgery and care as prescribed by Dr. Mannion.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of **$734.25**/week for **30-4/7** weeks, commencing **January 3, 2010** through **August 4, 2010**, as provided in Section 8(b) of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS: Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE: If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Gerald D. Jutila, arbitrator

October 23, 2010
Date

ICArbDec19(b)

SUMMARY OF THE CASE

Petitioner filed this Application for Adjustment of Claim with the Commission on February 5, 2010 alleging that he was injured in an accident that arose out of and in the course of his employment by the respondent when he slipped and fell on ice while working on January 2, 2010. He is a newspaper delivery person employed by the respondent. Respondent admits that petitioner was injured in the course of his employment but denies that the injury arose out of the employment because, it is argued, petitioner did not demonstrate he was exposed to the common risk of falling on ice to a greater degree than other persons in the general public at large, (AX1).

Petitioner's treating physician has recommended that petitioner undergo surgical repairs to his lumbar spine. Therefore, petitioner is also seeking an order from the Commission requiring respondent to authorize and provide for prospective medical care, (AX1).

FINDING OF FACTS

Petitioner was 45 years old at the time of this occurrence. He has been employed by the respondent Chicago Tribune for most of his adult life, 25 years. He is a large man; 6 feet, 10 inches weighing 310 pounds. Nevertheless, he appears to be well proportioned, in good shape and physically fit.

Petitioner's job duties require him to deliver bundles of newspapers for the Tribune and other publishers that have contracted with the Tribune to distribute their newspapers. Petitioner's delivery route and the locations for his deliveries are assigned to him by the respondent. His route is on the west side of Chicago, Oak Park, and River Forest. The route required petitioner to make approximately 100 stops for deliveries every day. The majority of petitioner's 7.5 hour shift is spent working along or near the side of the public roads and walks. Petitioner begins his work shift at 2:00 or 3:00 AM.

The respondent supplied petitioner a step van marked with its company logo for use in making the deliveries. Petitioner was the driver of that vehicle. The respondent also provided the driver with a helper. The job requires the delivery drivers to work in all types of weather. The Tribune is a morning paper and therefore during the winter months a large part of the delivery work is performed during the hours of darkness.

Petitioner testified that his helper would recover unsold product from the vending machines and load the boxes with new product. Petitioner would empty the cash boxes. At about 5 AM on January 2, 2010 he was at a

scheduled delivery stop at the intersection of Central and Keystone in River Forest. After he emptied the cash box he stepped off from the curb to return to his truck at which time he slipped on the ice and snow and fell. He testified that he noticed a great deal of pain in his low back and right leg. He was unable to get himself upright. He used his cell phone to call for assistance. The River Forest Police Department and Fire Department responded, (see PX2 for photos of the scene taken by the River Forest Police Department shortly after the accident and PX3 for photos of the scene taken by petitioner during the summer months. Petitioner was then transported to the Oak Park Hospital for evaluation.

The Rush Oak Park Hospital records were received I evidence as PX4. Petitioner was diagnosed with a low back contusion/sprain, treated with medications, advised to follow-up with an orthopedist, and released.

Petitioner was advised by his employer's representatives to follow up at a Concentra medical facility. He did so on January 5, 2010. Those records were received in evidence as PX5. Petitioner was examined and diagnosed with a back contusion, lumbar radiculopathy, lumbar strain and sacrum strain. He was giving modified activity instructions and advised to see an orthopedic surgeon at his earliest convenience.

Petitioner then consulted with Dr. Mannion at Northwest Orthopedic Surgery on January 6, 2010. Those records were received in evidence as PX6. Dr. Mannion noted petitioner complained of low back and leg pain. The SLR on the right was positive at 40 degrees and on the left it was positive at 70 degrees. Petitioner was taken off from work and an MRI study was ordered. That study was done on January 8 and was read as demonstrating a small to moderate disc protrusion at L3-4 and mild to moderate bilateral neural foraminal stenosis at L5-S1. An EMG/NCV study on January 18 demonstrated bilateral lumbosacral root involvement affecting L5 & S1 bilaterally and L3-4 on the right with acute and chronic features, (PX12). On January 19 petitioner underwent an injection of lidocaine and Depo-Medrol at L4-5 on the left. Following the injection petitioner experienced pain relief for a week. He was ordered to remain off from work and start physical therapy, (PX6). Petitioner had seven therapy session between February 5 and 19, 2010 (PX11). On March 1 Dr. Mannion noted no improvement with physical therapy and therefore recommended a repeat injection, (PX6). On April 8 and again on July 1, 2010 Dr. Mannion recommended petitioner for a one level laminectomy with possible arthrodesis, (PX8).

Meanwhile the respondent arranged for petitioner to be examined by a spinal surgeon, Dr. Bernstein, on May 20, 2010. His report was received in evidence as PX10. Dr. Bernstein noted petitioner had failed conservative care but

raised the issue as to whether he was a surgical candidate and requested the opportunity to review actual radiographic studies. After a review of those studies Dr. Bernstein issued a second report on July 21, 2010 wherein he opined that the patient is a reasonable candidate for a lumbar microdiskectomy in an effort to relieve his radiating pain, (PX14). Petitioner remains off from work under the direction of Dr. Mannion, (PX13).

The Health and Welfare Fund at petitioner's union has been paying some of petitioner's medical bills pursuant to a reimbursement agreement, (PX9). However, approximately $3,943.00 in medical expenses remains unpaid, (AX1, PX1 group exhibit).

Petitioner testified he desires to proceed with the prescribed surgery so he can get back to work.

ISSUES AND CONCLUSIONS

Did the petitioner sustain accidental injuries that arose out of and in the course of employment?

Respondent argues that petitioner slipped and fell in a public space accessible to the general public and that anyone walking in Chicago during the winter is exposed to our winter conditions of ice and snow. Respondent's observation is correct as far as it goes. However, there are substantial differences between a pedestrian member of the general public and a newspaper delivery person. The general public in the City of Chicago is not out traipsing around the streets of our city in the darkness of the early morning hours during the dead of winter. They are under their quilts. They are not required to maintain a schedule to accomplish 100 deliveries at 100 various and specific locations within a prescribed period of time. Of course there are some individuals on and about the streets at 5 AM, they being people who are out because of their job duties; police officers, fire fighters, paramedics, other delivery persons, etc.

The newspaper business in our times finds itself in serious competition with electronic media. The newspaper's product is perishable, hence the phrase: "That is old news." A newspaper will lose circulation and fail in its mission if its product is not delivered to the vending boxes before its customers, the general public, gets up and about.

The Fifth Century Greek historian, Herodotus, once wrote of the men in the courier service of the ancient Persian Empire. He wrote: *"It is said that as many days as there are in the whole journey, so many are the men and horses that stand along the road, each horse and man at the interval of a*

day's journey; and these are stayed neither by snow nor rain nor heat nor darkness from accomplishing their appointed course with all speed." The quotation was later modified and adopted by the United States Postal Service to read: *"Neither snow nor rain nor heat nor gloom of night stays these couriers from the swift completion of their appointed rounds."* The quote could well apply to a newspaper delivery person also.

Respondent also argues that the petitioner was not carrying anything at the time of his slip and fall. The arbitrator does not recall if the petitioner was asked whether or not he was carrying anything at the time he fell. However, the petitioner did testify that it was his responsibility to empty the vending machine cash boxes. A reasonable inference is that he was carrying the keys to the cash box locks for the vending machines in addition to a pouch or money bag for the cash he recovered from the cash boxes. It is doubtful that the petitioner would place his master's revenues in his pocket where they could comingle with his own coins.

The arbitrator concludes that petitioner has proven by a preponderance of the evidence that the injury he sustained as a result of his slip and fall on January 2, 2010 arose out of and in the course of his employment by the respondent.

Were the medical services that were provided to petitioner reasonable and necessary?

The arbitrator concludes that petitioner has proven by a preponderance of the evidence that the medical services provided to petitioner as reflected in the bills contained in PX1 (group exhibit) represent necessary medical care, reasonably required to diagnose, treat, cure and relieve petitioner from the effects of his injury and that those services are causally related to his work injury. The bills are properly the responsibility of respondent. Respondent is ordered to pay the bills contained in PX1 (group exhibit) pursuant to Section 8(a) of the Act but as limited by the Medical Fee Schedule, Section 8.2 of the Act.

What temporary benefits are in dispute?

Petitioner claims that as a result of his injury he has been temporarily totally disabled from January 3, 2010, (AX1). The respondent, to its credit, has paid the petitioner TTD benefits while it litigated the issue of whether the accident is compensable under the Workers' Compensation Act, (AX1).

The arbitrator concludes that petitioner has proven by a preponderance of the evidence that he has been temporarily totally disabled from January 3, 2010 through August 4, 2010, a period of 30 4/7 weeks.

Should the respondent be required to authorize and provide for prospective medical care?

The arbitrator concludes that petitioner has proven by a preponderance of the evidence that the prospective medical and surgical care prescribed by his treating surgeon, Dr. Mannion, constitutes necessary medical care that is reasonably required to cure or relieve him from the effects of his injury as is provided in Section 8(a) of the Act. Therefore, respondent is hereby ordered to authorize and provide for the prospective care prescribed by Dr. Mannion.

STATE OF ILLINOIS)
)
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g)
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
DECISION

Yuri Maln
Employee/Petitioner

v.

Paul TV & Electronics
Employer/Respondent

Case # **08WC51519 & 10WC7592**

Chicago, arbitrator Jutila

BACKGROUND

These two cases come before this arbitrator for a resolution of a fee dispute between two law firms that have represented the employee/petitioner (Maln) in a workers' compensation claim. Maln sustained serious injuries as a result of a fall off a ladder at work on June 29, 2008.

On November 21, 2008 the petitioner retained the Meyers Law Firm (Meyers) to represent him. At that time Maln signed a standard Attorney Representation Agreement containing a 20% contingent fee agreement with Meyers, (AX1). Meyers filed the original Application for Adjustment of Claim with the Commission that same day. The claim was assigned case number **08WC51519**, (AX2). This case was assigned to and is pending before arbitrator Jutila. The Meyers Law Firm continued to represent petitioner and his interests for approximately 15 months until February 18, 2010 when petitioner discharged Meyers.

Two days earlier on February 16, 2010 Maln retained the Spada Law Firm (Spada). On that date Maln signed another standard Attorney Representation Agreement containing a 20% contingent fee agreement with Spada, (AX3). Spada never filed his appearance, substitution of attorney, or a motion to discharge Meyers in the original case **08WC51519.** Instead, on February 26, 2010 Spada filed a duplicate Application for Adjustment of Claim with the Commission which was assigned case number **10WC7592**, (AX4). The second case was randomly assigned to arbitrator Black because the Commission had no way of knowing this was a duplicate filing unless it was advised of that fact by the attorney filing the application.

Illinois Workers' Compensation Commission form IC1 is the Application for Adjustment of Claim. The form contains the following inquiry: ***"If a prior application was ever filed for this employee, list the case number and its status_____."*** The form also contains the following admonition: ***"This is a legal document. Be sure all blanks are completed correctly. . ."*** Spada never answered the question regarding the filing of a prior application by advising the Commission of the pending case **08WC51519**, (see AX4).

Additionally, Commission Rule 7030.10 d (Arbitration Assignments) provides that duplicate filings are to be assigned to the original arbitrator. The rule is designed to maintain integrity in the randomization of case assignments to Chicago arbitrators and prevent an attorney for shopping for another arbitrator. Spada never presented a motion to consolidate the duplicate filings before arbitrator Jutila.

Meyers filed his Petition for Fees with the Commission on case number **08WC51519** on May 27, 2010 with Proof of Service by mail and facsimile to Spada also on May 27, 2010, (AX5).

The employee/petitioner and employer/respondent agreed to settle the claim sometime in May 2010 for the sum of $171,000.00. Settlement contracts, (AX6), were prepared bearing both case numbers **08WC51519** and **10WC7592** and signed by Maln on June 7, 2010 wherein he agreed to pay attorney fees in the amount of $34,200.00 calculated as follows: ($171,000.00 X 20% = $34,200.00). Spada also signed the contracts on June 7, 2010 and therein he attested that any fee petitions on file with the IWCC have been resolved, (see AX6). However, the two law firms had never come to an agreement as to a division of the $34,200.00 in attorney fees provided for in the settlement contract. Therefore, Spada's attestation was a false statement of fact to this tribunal.

Spada forwarded the settlement contracts to arbitrator Black seeking his approval of the contracts. The contracts arrived at the Commission on June 10, 2010. I arranged for the contract to be sent to me pursuant to Commission Rule 7030.10 d. The contract is now before this me for review and approval or rejection.

Meyers' Petitions for Attorney Fees, (AX5 & 7), and Spada's Petition for Fees, (AX8), came before me on June 15, 2010 in the City of Chicago. Both the original and successor law firms were present and were offered an opportunity to make a record. Both declined. Therefore, a record of the hearing was not made. Both law firms have provided the arbitrator with written itemizations of their time and the efforts each have expended on behalf of the petitioner. Additionally the two law firms have presented the arbitrator with arguments in support of their respective positions on a division of the fees. Indeed, the arbitrator even heard from the injured worker, Maln.

All of the above referenced arbitrator's exhibits (AX1 through AX8) are made a part of the Commission file in the event the arbitrator's findings and conclusions are reviewed by higher authority.

After hearing the parties' arguments and due deliberation, I hereby make findings and reach conclusions as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Illinois law recognizes the absolute right of a client to discharge his attorney at any time for any reason. Therefore, Maln has the absolute right to discharge Meyers with or without cause.

Maln would prefer that the Meyers firm not receive any part of the fee for reasons that he has been unable to articulate to the arbitrator. However, the arbitrator is bound to follow Illinois law in awarding attorney fees.

In 1979 our Supreme Court issued a decision providing that an attorney who enters into a contingent fee agreement with a client and is discharged without cause is entitled to be paid on a *quantum meruit* basis as a reasonable fee for services rendered before discharge, Rhoades v. Norfolk & Western Ry. Co. 78 Ill.2d 217 (1979). (*Quantum meruit* is Latin for "as much as he deserves.")

However, the Rhoades Court also noted that in cases in which an attorney who has done much work is fired immediately before settlement is reached, the factors involved in determining a reasonable fee would justify a finding that the entire contract fee is the reasonable value of services rendered. In this way the client's right to discharge the attorney is protected as is the attorney's right to fair compensation for work performed.

In a later Illinois Appellate Court case where the client discharged his original attorney after most of the work had been done Justice Thomas remanded the case to the trial court directing it to award the contract fee to the original attorney less the amount that is to be awarded to the successor attorneys in *quantum meruit*, Wegner v. Arnold, 305 Ill.App.3d 689, (Second District 1999). That approach was followed in Delapaz v Selectbuild Construction, No. 1-08-2072, (First District 2009), citing reasons of fairness and equitable principles because most of the work performed was done by employees of the original firm.

Factors to be considered

A number of factors must be considered by the arbitrator in his exercise of discretion in an award of attorney fees, (the time and labor required, the nature of the cause, the novelty and difficulty of the subject matter, the attorney's degree of responsibility in managing the case, the usual and customary charge for that type of work in the community, and the benefits resulting to the client), Wegner v. Arnold, *supra*, citing Kannewurf v Johns, 260 Ill.App3d 66 1994)..

Time and labor, novelty and difficulty of the subject matter, benefits to client

Meyers has filed a detailed ten page itemization of his efforts on behalf of Maln including dates, the nature of the services, and the time expended. A careful reading of Meyers' filing presents a picture of a client frustrated over the seriousness of his injuries, and the complications that arose from his injuries and the surgeries. He required a great deal of counseling, advice, and professional services. This was no routine workers' compensation claim. Petitioner underwent an open reduction of a fracture with placement of internal fixation devices. Thereafter, he developed a serious infection which required him to undergo multiple additional surgeries. Maln lost trust in his original surgeons. Thereafter Meyers found and arranged for competent physicians and surgeons to treat Maln. Meyers performed extensive coordination between the petitioner and his treating physicians, and between the petitioner and respondent's workers'

compensation representatives. Additionally, Meyers was required to counsel and advise petitioner on a regular basis. Meyers even made their attorneys available to Maln beyond normal office hours. Meyers represented petitioner faithfully and competently during the difficult phase of medical treatment when problems arose that required solutions.

The efforts of Meyers clearly required a great deal of skill from which Maln benefited. Meyers' efforts resulted in an opening settlement offer from the respondent in the amount of $100,000.00 after which Meyers was abruptly discharged by Maln. When Meyers was discharged all that was left to do was complete negotiations on a fair settlement amount with respondent's representatives. Meyers' filing demonstrates he provided 83 hours of professional services on behalf of Maln over a 15 month period, (AX5 & 7).

The professional services provided by Meyers were unique and required the exercise of skill and the expenditure of an unusual amount of time and effort, all of which benefited Maln.

When Spada entered the picture the only remaining issue to be resolved was: At what amount would both parties agree to settle? The respondent was by all indications highly motivated to settle the claim. It had plenty of incentives for it to close out the claim and cap its exposure: There was no apparent issue as to compensability of the claim. Maln was at maximum medical improvement. He had limitations on his physical activities and had not yet found suitable alternative employment, (see medical report attached to AX6). Respondent had been paying Maln weekly temporary total disability benefits for 19-1/2 months and was continuing to pay benefits. It could conceivably be required to provide Maln with vocational services. Maln's injuries were serious and respondent had already incurred substantial medical expenses. Respondent's opening settlement offer of $100,000.00 to Meyers is evidence that it was serious in its efforts to finalize the claim.

Spada's filing (AX8) demonstrates that he invested 7.25 hours on behalf of Malm. Spada completed the settlement negotiations resulting in the final settlement offer from the respondent in the amount of $171,000.00 which was ultimately accepted by petitioner.

Based upon the foregoing analysis the professional services provided by Spada to Maln were neither novel nor unique and did not require a great deal of time, effort, or skill.

Nature of the cause and usual and customary charges

Maln's claim and the dispute that is the subject of this order arise under the Workers' Compensation Act. Generally, attorney's fees in Illinois Workers' Compensation cases are set at 20% of the recovery with certain limitations and exceptions.

Section 16a of the Act (Attorney's Fees) provides in part: ***". . . no claim of any attorney for services rendered in connection with the securing of compensation for an employee . . ., whether secured by agreement, order, award, or judgment in any court shall exceed 20% of the amount of compensation recovered and paid, unless further fees shall be allowed to the***

attorney upon a hearing by the Commission fixing fees, and subject to the other provisions of this section. However, . . . the amount of attorney fees shall not exceed 20% of the sum which would be due under this Act for 364 weeks of permanent total disability based upon the employee's average gross weekly wage prior to the date of the accident subject to the maximum weekly benefits provided in this Act unless further fees shall be allowed to the attorney upon a hearing by the Commission fixing fees."

Section 16 of the Act also provides in part: ***"The Commission shall have the power to determine the reasonableness and fix the amount of any fee of compensation charged by any person, including attorneys . . . for any service performed in connection with this Act, or for which payment is to be made under this Act or rendered in securing any right under this Act."***

The settlement contracts before the arbitrator propose a total settlement in the amount of $171,000.00 with a 20% attorney's fee in the amount of $34,200.00. Maln's average weekly wage at the time of the accident was $641.37, (AX6). The maximum weekly benefit that could be allowed for Maln for permanent total disability is $441.93. The maximum allowable attorney fee under this settlement contract absent a hearing by the Commission to fix fees at a higher amount is $32,172.50 calculated as follows: ($441.93 X 364 weeks = $160,862.52 X 20% = $32,172.50). Therefore, the $34,000.00 fee claimed by Spada on the contracts he signed exceeds the maximum allowable fee of $32,172.50 by $1,827.50.

Meyers name and signature are not on the contracts. Instead, Spada signed the contracts as the petitioner's attorney. Spada has not petitioned the Commission for a hearing to set fees in excess of the maximum amount allowable and indeed he has failed to present any evidence that the work he performed and the 7.25 hours he expended on behalf of Maln was of unusual difficulty that would warrant an order allowing for attorney's fees in excess of the statutory maximum.

During this arbitrator's discussions with the attorneys involved in this dispute Spada opined that a rate of $150.00 per hour would be an appropriate hourly fee for the work done by Meyers.

Skill and standing of the attorney

The arbitrator notes that Meyers enjoys a reputation at the Commission as an experienced attorney in the field of workers' compensation and he has demonstrated his competence in the handling of this claim. Spada's standing is an unknown inasmuch as he has no prior reputation with this arbitrator; good or bad. However, Spada's carelessness and inattention to detail in the documents he has filed with the Commission and the actions he otherwise failed to take raise a legitimate question as to his skill level.

Specifically, Spada's attestation on the settlement contracts he forwarded to arbitrator Black that any fee petitions on file with the Commission have been resolved was a false statement of fact and is evidence of a lack of candor toward this tribunal. Additionally, he failed to advise the Commission of the prior filing of the original application when he filed a duplicate

application. He failed to file an appearance (IWCC form IC06) in the original claim after being retained by the petitioner, he failed to file a stipulation to substitute attorneys (IWCC form IC29) or in the alternative file a motion to dismiss the attorney of record (IWCC form IC27), and he failed to file a motion to consolidate the two claims (IWCC form IC04). All of these forms are available for downloading on the Commission website. Finally, Spada has claimed a fee in excess of the maximum amount allowed by Section 16a without seeking prior approval from the Commission.

The arbitrator does not reach any conclusion as to the motives of Spada. However, the actions and inactions of Spada in what he has done and what he has failed to do reflect on his professional skill level and either a lack of knowledge or unwillingness to apply what he knew or should have known in regards to Illinois workers' compensation law, and practice and procedures before the Illinois Workers' Compensation Commission.

The arbitrator concludes the decisions of our Appellate Courts in Wegner v Arnold and Delapaz v Selectbuild apply to the facts in the instant case and that the a fair division of fees herein require that the original attorney, Meyers, be awarded the amount of the contract subject to the limitations of Section 16a, less the amount awarded to the successor attorney, Spada, on the basis of *quantum meruit.*

ORDER

1. CASE NUMBER 10WC7592 IS HEREBY CONSOLIDATED WITH CASE NUMBER 08WC51519.

2. THE SETTLEMENT CONTRACTS SHALL BE AMENDED AND INITIALED BY MEYERS AND SPADA TO REFLECT THAT THE TOTAL ATTORNEY FEES ALLOWED HEREIN ARE CAPPED IN THE AMOUNT OF $32,172.50.

3. THE SETTLEMENT CONTRACTS SHALL BE AMENDED AND INITIALED BY MEYERS AND SPADA TO REFLECT SPADA IS AWARDED AN ATTORNEY FEE OF $1,087.50 CALCULATED ON THE BASIS OF *QUANTUM MERUIT* AS FOLLOWS: (7.25 HOURS X $150.00 PER HOUR), PLUS $140.00 IN COSTS.

4. THE SETTLEMENT CONTRACTS SHALL BE AMENDED AND INITIALED BY MEYERS AND SPADA TO REFLECT MEYERS IS AWARDED AN ATTORNEY FEE OF $31,085.00 CALCULATED ON THE AMOUNT OF THE CONTRACT AS LIMITED BY SECTION 16A, LESS THE AMOUNT AWARDED TO SPADA IN *QUANTUM MERUIT,* PLUS $389.00 IN COSTS.

5. THE SETTLEMENT CONTRACTS SHALL BE AMENDED AND INITIALED BY MEYERS AND SPADA TO REFLECT AN INCREASE IN THE NET AMOUNT DUE MALN FROM $136,660.00 TO $138,298.50.

THIS IS A FINAL AND APPEALABLE ORDER.

Unless a *Petition for Review* is filed within 30 days from the date of receipt of this order, and a review perfected in accordance with the Act and the Rules, this order will be entered as the decision of the Workers' Compensation Commission.

Gerald D. Jutila, arbitrator

June 23, 2010
Date